



# “This case is about you and your future”: Towards Judgments for Children

Helen Stalford and Kathryn Hollingsworth\*

A handful of ‘child-friendly’ judgments have emerged in the UK in recent years, attempting to adopt a child-centred approach to the decision-making stage of the legal process. Most notable is Sir Peter Jackson’s judgment in *Re A: Letter to a Young Person* which, in taking the form of a letter to the child, has been applauded as a model of how to achieve ‘child friendly justice’. This article examines how and why the form and presentation of judicial decisions is an important aspect of children’s access to justice, considering not just the potential but the *duty* of judges to enhance children’s status and capacities as legal citizens through judgment writing. We identify four potential functions of judgments written *for* children (communicative, developmental, instructive and legally transformative), and call for a radical reappraisal of the way in which judgments are constructed and conveyed with a view to promoting children’s access to justice.

## INTRODUCTION

*‘Dear Sam . . . This case is about you and your future, so I am writing this letter as a way of giving my decision to you and to your parents.’*

These are the opening lines of Mr Justice Peter Jackson’s celebrated decision in *Re A: Letter to a Young Person*,<sup>1</sup> an English case concerning a 14-year-old boy (Sam) at the centre of a bitter custody dispute between his father and his mother and stepfather, with whom Sam was resident. Sam’s father wanted to relocate to another country and Sam, who wished to go with him, made the original application to the High Court, instructing his own solicitor. The judge issued his final decision in the form of a letter to Sam which was read to his parents and then given to his solicitor to pass on and explain to him on his return from a school trip. The letter was anonymised and published on Bailii<sup>2</sup> with Sam’s consent. It is approximately 2,750 words long and sets out in clear terms the current law, the role of the judge, the key questions that were raised in the case, the matters that were taken into account in reaching the decision, and the final decision itself.

\*University of Liverpool and University of Newcastle respectively. We are extremely grateful to Michelle Farrell, Christina Hudson, Rosemary Hunter, Ton Liefwaard, Aoife Nolan and the anonymous reviewers for their insightful comments on an earlier draft of this article. We also benefited from valuable feedback following work-in-progress seminars to colleagues in our own institutions, and to those who responded to our paper at the SLSA annual conference in April 2019. Any remaining errors or omissions are our own.

1 [2017] EWFC 48.

2 British and Irish Legal Information Institute at <http://www.bailii.org/> (see specifically <https://www.bailii.org/ew/cases/EWFC/H CJ/2017/48.html> (last accessed 10 April 2020)).

There is nothing particularly remarkable about this decision in substance – it is a routine private family law case concerning the wishes and feelings of a competent 14-year-old boy – but the presentation of the judgment has been applauded by the legal community and children’s rights advocates alike as a model of how to communicate with children. It has been recognised for some time now, and certainly since the advent of the UN Convention on the Rights of the Child 1989 (UNCRC), that it is not enough to simply afford children rights on paper; some adaptations to justice proceedings need also to be made to accommodate their distinct needs and vulnerabilities and to enable children to participate meaningfully in the legal process. This notion is commonly referred to as ‘Child Friendly Justice’, a term coined by the Council of Europe in the context of its Child Friendly Justice Guidelines, published in 2010.<sup>3</sup> There is an ongoing campaign to embed this guidance into everyday legal practice, manifested in a proliferation of training toolkits, funding for research and exchange of best practice. The judiciary in England and Wales are also becoming increasingly vocal about the need to create the conditions to facilitate more effective participation by children in judicial proceedings. Particularly noteworthy is Sir James Munby’s plea to the judiciary to ‘ponder . . . whether our traditional approach is right; whether it accords with the demands of our international obligations; and . . . how we can continue to justify it when so many of those who represent the voice of the child are pressing for change.’<sup>4</sup>

Commendable as these calls to action are in seeking to bring justice systems and practices into line with children’s rights, efforts to date to render the justice process ‘child friendly’ have almost entirely focused on the procedures for treatment of children *pre*-decision, notably in the context of hearing evidence and enabling children to ‘feel’ part of proceedings.<sup>5</sup> Whilst there is ever clearer guidance – imperfect as it may apply in practice – as to how children’s views should be communicated to the court (especially the judge),<sup>6</sup> there is rather less certainty and consistency regarding how the views of the judge are, and should be, communicated to the child. The ‘Letter to Sam’ is one of a handful of so-called child-friendly judgments to have emerged from the UK and some

3 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. (Strasbourg: Council of Europe, 2010). For a brief discussion of how guidance on child-friendly justice has evolved, see H. Stalford, L. Cairns and J. Marshall, ‘Achieving Child Friendly Justice through Child Friendly Methods: Let’s Start with the Right to Information’ (2017) 5 *Social Inclusion* 207, 207–208.

4 J. Munby, ‘Unheard Voices: the Involvement of Children and Vulnerable People in the Family Justice System The Annual Lecture of The Wales Observatory on Human Rights of Children and Young People’ lecture delivered by Sir James Munby, President of the Family Division at the College of Law, Swansea University, 25 June 2015, 2; See also J. Munby, ‘Children Across the Justice Systems’ The 2017 Parmoor Lecture to the Howard League for Penal Reform Given by Sir James Munby President of the Family Division 30 October 2017, 8.

5 See for example the comments of Lord Thorpe in *Re G (Abduction: Children’s Objections)* [2011] 1 FLR 1645.

6 See U. Kilkelly, *Listening to Children about Justice: Report of the Council Of Europe on Child-Friendly Justice* (Council of Europe, 5 October 2010) 16 who notes that ‘[e]mpirical research with children and young people has found that children favour speaking directly to the judge because they want their views heard by the ultimate decision-maker’.

European courts in recent years,<sup>7</sup> that attempt to address this gap by extending a child-centred approach to the decision-making stage of the legal process.<sup>8</sup> But such examples remain few and far between and risk reinforcing a relatively superficial, perhaps even sentimentalised engagement with the notion of child friendly justice, confining more creative attempts at judgment-writing to a niche set of cases, under narrowly prescribed conditions.

This article offers a more profound examination of why the form and presentation of judicial decisions – as much as their substance – act as an important component of children’s access to justice.<sup>9</sup> In doing so, we advocate for a shift in terminology, away from ‘child friendly justice’ towards ‘justice for children’ and, correspondingly, make the case for ‘judgments for children’ as opposed to ‘child friendly judgments’. We argue that judges have a duty, through the art and craft of judgment writing,<sup>10</sup> to acknowledge and engage children, not simply as individuals personally and directly impacted by a specific set of proceedings, but as a disenfranchised category of legal citizens more broadly.<sup>11</sup> In so doing we identify four potential functions of judgments written *for* children which we suggest serve to enhance children’s experiences and understanding of, and access to, justice. We refer to these as: the communicative; the developmental; the instructive; and the legally transformative functions. Whilst our analysis is very much located within the legal tradition and judicial conventions of England and Wales, our aim is to serve wider calls to render judicial decision-making more accountable and meaningful to all those – adults and children alike – who may be involved in legal proceedings, in any jurisdiction, either as parties or witnesses.

7 See Peter Jackson’s earlier ‘plain English’ judgment in *Lancashire County Council v M and Others* [2016] EWFC 9. Whilst this judgment looks at first glance like a more conventional judgment, it is relatively short (43 paragraphs long) and explains the complex factual and legal context in simple terms. In a Scottish family law context, see the note by Sheriff Aisha Anwar in *Mr Patrick (a pseudonym) v Mrs Patrick (a pseudonym)* [2017] SC GLA 46. This integrates a tailored letter to the children at the centre of the contact dispute into an abbreviated judgment. A handful of child friendly judgments have emerged in the Netherlands in recent years too. See in particular the District Court of Rotterdam case ECLI:NL:RBROT:2017:911 (January 2017), concerning two children involved in family proceedings who claimed that their views were being ignored by the judge. The court’s judgment, which rejected the claim, was formulated in ‘a language that children can understand’. Using short summaries and interim conclusions, the court attempted to explain the steps that had led to the final judgment. The legal grounds of the judgment were also formulated in a less formal way. See further J.H. Lieber, ‘De Rechter en de Taal van het Kind’ 2018/40 *Tijdschrift voor Familie en Jeugdrecht*.

8 We purposefully use the term ‘decision-making’, rather than the ‘decision-communication’ or ‘decision-expression stage’ to differentiate this point in proceedings from those earlier (evidence gathering/argument-making) points of the proceedings, whilst also seeking to convey the interrelationship between the decision-making *process* and the actual communication of the decision.

9 For a broader discussion of the components of children’s access to justice, see T. Liefwaard, ‘Access to Justice for Children: Towards a Specific Research and Implementation Agenda’ (2019) 27 *IJCR* 195.

10 E. Rackley, ‘The Art and Craft of Writing Judgments: Notes on the Feminist Judgment Project’ in R. Hunter, C. McGlynn and E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010).

11 We use the term legal citizen to mean simply those who are subject to the law. For a more detailed discussion of children’s citizenship see A. Invernizzi and J. Williams (eds), *Children and Citizenship* (London: Sage Publications Ltd, 2008).

To set the scene for this analysis, we begin with some initial reflections on the form of court judgments more generally, and on the way in which these differ according to the legal context. In doing so, we explore opportunities for fostering judicial creativity in judgment-writing even where legal, ethical, cultural, practical and procedural concerns ostensibly confine judges to more conventional, and arguably less accessible, approaches.

## JUDGMENTS INVOLVING CHILDREN: CONTEXT AND CONVENTIONS

A comprehensive review of different approaches to judge-craft and its impact on children is beyond the scope of this paper,<sup>12</sup> but a basic understanding of the way in which judges deliver their judgments in various contexts helps us to appreciate not only the methodological complexities of gathering those insights, but the challenges of nurturing a commitment to more transparent, clear and meaningful judgments for children.

The major challenges come from the sheer scale and diversity of proceedings involving children and, indeed the heterogeneity of children's characteristics, interests and claims within those proceedings. In 2018 alone in England and Wales, 35,673 children were involved in child protection proceedings, there were a further 5,104 adoption order applications, and 118,921 children were implicated in private law (child arrangements, maintenance) proceedings.<sup>13</sup> In 2017–18, 31,509 children were subject to court-based criminal proceedings and 22,996 received sentences.<sup>14</sup> There were also 4,725 registered appeals relating

12 On judge-craft, key sources include Arden, LJ, 'Judgment Writing: are Shorter Judgments Achievable?' (2012) 128 LQR 515; M. Andenas and D. Fairgrieve, 'Simply a Matter of Style? Comparing Judicial Decisions' University of Oslo Faculty of Law Legal Studies Research Paper Series No 2013-13; M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: OUP, 2004); C. Oldfather, 'Writing, Cognition, and the Nature of the Judicial Function' (2008) 96 Geo LJ 1283; J. Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Concerning Children' (2009) 33 *Melbourne University Law Review* 590; J. Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2; M. Clemente, D. Padilla-Racero, M. Gandoy-Crego, A. Reig-Botella and R. Gonzalez-Rodriguez, 'Judicial Decision-Making in Family Law Proceedings' (2015) 43 *The American Journal of Family Therapy* 314; Lord Rodger 'The Form and Language of Judicial Opinions' (2002) 118 LQR 226; M. Wolff, 'Making Judge-Speak Clear Amidst the Babel of Lawspeakers' (2014) 79 *Missouri Law Review* 1; R. Sheard (ed), *A Matter of Judgment: Judicial Decision-making and Judgment-writing* (Sydney: Judicial Commission of New South Wales, 2003).

13 Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, Annual 2017 including October to December 2017* (2018) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/789792/FCSQ\\_October\\_to\\_December\\_2018\\_-\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789792/FCSQ_October_to_December_2018_-_final.pdf) (last accessed 9 January 2020).

14 Of whom 24 per cent were aged 10–14 years old. Youth Justice Board, Ministry of Justice, *Youth Justice Statistics 2017-18 England and Wales* (2019) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/774866/youth\\_justice\\_statistics\\_bulletin\\_2017\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/774866/youth_justice_statistics_bulletin_2017_2018.pdf) (last accessed 22 October 2019). In addition, 10,999 children were given cautions by the police.

to Special Educational Needs provision in England,<sup>15</sup> as well as 2,872 claims for asylum for unaccompanied children in 2018.<sup>16</sup> Whilst the proceedings in each of these cases progress at different rates and are settled in varying ways, such statistics illustrate that tens of thousands of children every year – hundreds of children every day – are the subject of a legal decision of some form or another.

Some (but by no means all) of the main judicial fora in which children's cases are heard, whether that be the magistrates (youth courts), tribunals, or courts (Crown Court, High Court, and Courts of Appeal), can be adapted to accommodate children, notably in terms of procedures for hearing children's evidence. But such adaptations have yet to extend in any significant way to how decisions are conveyed to children. Moreover, the closed nature of many such proceedings makes it difficult to monitor in any comprehensive way the nature (or 'quality') of justice dispensed to children. Youth courts, for instance, are not open (for very good reason) to the public without permission. Their judgments and sentencing decisions – which can include custodial as well as community sentences – are mostly *ex tempore*, delivered orally, and are not published. On deliberations of guilt there are no, or few, reasons given. In more serious trials at Crown court, it is juries who determine guilt or innocence on the basis of the evidence presented rather than the judge whose main decision-making task is to impose a sentence; and only sentencing remarks from the most high-profile or very serious cases are published.<sup>17</sup>

Similarly, some tribunals<sup>18</sup> have made adaptations to meet children's needs during proceedings,<sup>19</sup> but there has been virtually no scrutiny of how their decisions are conveyed to children, or indeed, to the public at large. Tribunal decisions of all types are generally written down and available to the parties

15 SEND Tribunals, Table1 Special Educational Needs: Appeals Registered and Outcomes in England, 2011–12 to 2016–17. See also the report by A. Cullen et al, *Review of Arrangements for Disagreement Resolution* (London: Department for Education and Ministry of Justice, 2017).

16 Refugee Council, *Children in the Asylum System* (August 2018) at <https://www.refugeecouncil.org.uk/wp-content/uploads/2019/06/Children-in-the-Asylum-System-May-2019.pdf> (last accessed 22 October 2019).

17 Those that are published are available at <https://www.judiciary.uk/judgments/> (last accessed 22 October 2019).

18 First tier (first instance) tribunals of most relevance to children include: the Social Entitlement Chamber (which hears cases on social security and child support, asylum support and criminal injuries compensation); the Health, Education and Social Care Chamber (which hears cases on mental health, care standards, and special educational needs and disability provision); and the Immigration and Asylum Chamber. The Tribunals, Courts and Enforcement Act 2007 radically overhauled the tribunals system in the UK to reduce fragmentation and encourage judicial diversity by expanding the appointment criteria. The system is due for further modernisation under the direction of Sir Ernest Ryder to achieve a more digitised, streamlined, transparent and user-friendly process. See further Senior President of Tribunals Annual Report, 2018 at <https://www.judiciary.uk/wp-content/uploads/2018/05/spt-annual-report-2018-v3.pdf> (last accessed 22 October 2019); and 'The Modernisation of Tribunals: Innovation Plan for 2019–2020' at <https://www.judiciary.uk/wp-content/uploads/2019/04/InnovationPlanFor2019-20Copy.pdf> (last accessed 22 October 2019).

19 Notably in the context of Special Educational Needs in England, by virtue of Part 3 of the Children and Families Act 2014. See further N. Harris and G. Davidge, 'The Practical Realisation of Children and Young People's Participation Rights: Special Educational Needs in England' (2019) 31 CFLQ 25.

but are not necessarily reported publicly;<sup>20</sup> it is not until such cases reach the upper tier on appeal<sup>21</sup> that they are published (online) and publicly available.

Most other proceedings relating to children are dealt with in the Family Court by magistrates or a district or circuit judge, depending on the complexity and seriousness of the case.<sup>22</sup> More serious cases or cases of legal significance concerning children's medical treatment, property or welfare are heard by judges in the Family Division of the High Court or by the Court of Protection.<sup>23</sup> Again, such proceedings generally take place in private, and only those judgments deemed to be of particular legal or public interest, including those that progress to the Court of Appeal and the Supreme Court, are published.<sup>24</sup>

This cursory snapshot highlights that even within a single jurisdiction, judgments differ significantly depending on the legal sub-context, the nature of the proceedings and jurisdictional level. And, of course, the individual characteristics, preferences and experience of judges also play a key role.<sup>25</sup> Aside from the requirement to anonymise judgments concerning children,<sup>26</sup> there are no specific conditions regarding the way in which judges compose and present such judgments, either in form, tone or substance. Insofar as they can range from 2,000–30,000 words long with varying levels of legal, procedural and factual detail, perhaps the only common factor shared by UK judgments is that they are usually impenetrable to the children directly affected by them.<sup>27</sup> A further compounding factor is that most children at the centre of legal proceedings will not be physically present at hearings; and some, for a variety of reasons linked to age, capacity or welfare, may not even be aware that they are taking place. Proceedings relating to the discovery and disclosure of paternity are a case in point.<sup>28</sup>

20 With the exception of Health Education and Social Care Chamber decisions, a small number of which are available online.

21 Appeals from the Social Entitlement Chamber and the Health, Education and Social Care Chamber are heard by the Administrative Appeals Chamber of the Upper Tier. Immigration and Asylum appeals are heard by the Immigration and Asylum Chamber of the Upper Tier.

22 The County Court also hears appeals from the Magistrates' courts, Magistrates' Court Act 1980, s 111A as amended by the Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2009, s 4.

23 Established by the Mental Capacity Act 2005 and operating under the direction of the President of the family division of the High Court. Statutory Instrument 2007 No 1897 The Mental Capacity Act 2005 (Commencement No 2) Order 2007; Statutory Instrument 2007 No 1744 The Court of Protection Rules 2007.

24 Most of these judgments are published within at least two weeks of being delivered and can be accessed online through BAILII.

25 As demonstrated by the judgment re-writing projects. See for example, Hunter, McGlynn and Rackley, n 10 above and H. Stalford, K. Hollingsworth and S. Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Oxford: Bloomsbury Hart, 2017).

26 See Children and Young Persons Act 1933, ss 39 and 49; Youth Justice and Criminal Evidence Act 1999, s 45. Anonymity can be lifted in certain circumstances.

27 See for example Howard League for Penal Reform, *Children and Sentencing* at [https://howardleague.org/wp-content/uploads/2018/03/D\\_ADULT\\_Guide.pdf](https://howardleague.org/wp-content/uploads/2018/03/D_ADULT_Guide.pdf) (last accessed 22 October 2019).

28 See for example *AB v CD & C* [2019] EWHC 1695 where Mr Justice Cohen was called upon to decide whether the mother of a 'young child' ('C' – we are not told his age) should be ordered to disclose the identity of C's biological father to both her husband and to C.



This prompts some consideration of why it is legitimate to call upon judges to communicate their decisions directly to children – including to those who have no immediate interest in or ability to understand them – and of whether judges are receptive to such a plea. The overarching obligations within the international and domestic regulatory framework offer a useful starting point for responding to this question.

## JUDICIAL DECISIONS RELATING TO CHILDREN: REGULATORY OBLIGATIONS

Procedural guidance at international, European and domestic level suggests that judges should be doing rather more than is currently the case to achieve clarity, transparency, and certainty when it comes to judicial decision-making affecting children. The Council of Europe Guidelines on Child Friendly Justice, for instance, asserts that:

Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.<sup>29</sup>

These recommendations are reinforced by the more recent Guidelines on Children in Contact with the Justice System, developed by the International Association of Youth and Family Judges and Magistrates (2016).<sup>30</sup> These acknowledge a direct correlation between children's fundamental right to participation and the notion of judgments for children:

In order to participate adequately, children must be provided with all necessary information. When decisions or rulings are made, they should be explained to the children in a language that they can understand, particularly when they conflict with their expressed wishes or views.<sup>31</sup>

The same point is reiterated in other regional and international guidance, including the Guidelines on Action for Children in the Justice System in Africa,<sup>32</sup> the United Nations Guidelines for Action on Children in the Criminal Justice System,<sup>33</sup> the United Nations Guidelines on Justice in matters involving

<sup>29</sup> Council of Europe, n 3 above, guideline 49.

<sup>30</sup> [http://www.aimjf.org/download//Documentation\\_EN/AIMJF/Guidelines\\_-\\_ENG\\_-\\_Ratified\\_17.04.26.pdf](http://www.aimjf.org/download//Documentation_EN/AIMJF/Guidelines_-_ENG_-_Ratified_17.04.26.pdf) (last accessed 22 October 2019).

<sup>31</sup> *ibid*, para 2.3.3.

<sup>32</sup> Child Friendly Justice in Africa at <http://uszm.hr/wp-content/uploads/2011/11/CHILD-FRIENDLY-JUSTICE-IN-AFRICA-draft.pdf> (last accessed 10 April 2020), para 3.1.6 states that 'Judgments and court rulings affecting children should be explained to them in language that children can understand.'

<sup>33</sup> Economic and Social Council resolution 1997/30, adopted in 1997, see for example paras 47 and 51.

Child Victims and Witnesses,<sup>34</sup> and the thematic guidelines issued by the US National Council of Juvenile and Family Court Judges.<sup>35</sup>

UK domestic guidance is even more prescriptive in requiring courts to facilitate children's understanding not only of the legal process but of any outcomes. For example, guidance for immigration and asylum tribunals acknowledges that:

Effective communication is the bedrock of the legal process; everyone involved in legal proceedings must understand and be understood or the process of law will be seriously impeded. Judges must reduce the impact of misunderstandings in communication.<sup>36</sup>

Under the Family Procedural Rules, entire practice directions are dedicated to communication of information to children with a view to maximising their participation in and understanding of public and private family law decision-making.<sup>37</sup> Similarly, children and other vulnerable people subject to Court of Protection proceedings must be notified *personally* of final orders relating to their case 'in a way that is appropriate to P's circumstances (for example, using simple language, visual aids or any other appropriate means)'.<sup>38</sup>

In a criminal justice context, youth court magistrates are obliged to: 'explain to the relevant minor the nature of the proceedings and, where he is charged with an offence, the substance of the charge. The explanation shall be given in simple language suitable to his age and understanding'.<sup>39</sup> At the sentencing stage, the court must be satisfied that the child or young person has understood the sentence imposed and, to facilitate this, there is an invitation (rather than an obligation) that 'the chairman *may* . . . adapt the language used so that it is appropriate to the child or young person the court is dealing with.'<sup>40</sup> Before finally disposing of a case, the guidance provides that the court 'will explain

34 Economic and Social Council resolution 2005/20, adopted in 2005 at <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf> (last accessed 10 April 2020), para 20 relating to their right to be informed of progress on and disposition of their case.

35 Resource Guidelines, Reno, Nevada, NCJFCJ, 1995. These repeatedly recommend that 'The juvenile delinquency court's written findings and orders should be stated in language understandable by the parties . . . at the conclusion of the hearing' (see for example *ibid*, 96, Chapter IV, para F; and 108–109, Chapter V).

36 Tribunals Judiciary, *Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance* at <https://www.judiciary.gov.uk/wp-content/uploads/2014/07/ChildWitnessGuidance.pdf> (last accessed 22 October 2019) paras 16–17.

37 Practice Direction 12G of the Family Procedure Rules, ch 7 at [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12g](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12g) (last accessed 22 October 2019); and Practice Direction 14E at [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_14e](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_14e) (last accessed 22 October 2019).

38 See generally Part 2 of the Mental Capacity Act, ss 45–61; but more specifically: Mental Capacity, England and Wales: The Court of Protection Rules 2007, SI2007/1744 (L.12), para 46.

39 Magistrates' Courts (Children and Young Persons) Rules 1992, Rule 6(1) and (2) (Part II, applies to criminal proceedings).

40 Judicial College, *Youth Court Bench Book* (2017) 64 at <https://www.judiciary.uk/wp-content/uploads/2016/10/youth-court-bench-book-august2017-v2-140318.pdf> (last accessed 22 October 2019).



the nature and effect of its order to the child or young person, and to his or her parent, guardian or carer, and will check the child or young person's understanding of the court's decision.<sup>41</sup>

In summary, then, there is an overarching expectation in all legal proceedings involving children that the legal outcomes are communicated *to* the child, with a particular emphasis on facilitating the child's understanding of the decision. But the rules regarding what information should be communicated, how and by whom vary significantly depending on the nature and stage of the proceedings. Even the most prescriptive guidance is ambiguous as to the precise role of judges in communicating their decisions to children. Rather, the default position is that other adult proxies – typically the child's legal or welfare representative – will distil and explain the most relevant aspects of court decisions and consider follow-up options, drawing on their professional training and understanding of the child's personal characteristics and situation.

Such presumptions are problematic for a number of reasons, not least because they vest considerable faith in practitioners' ability and the current resourcing of our justice system to achieve this. In reality legal and welfare practitioners may be no more equipped to achieve this than judges. Most lawyers, for example, even those working on complex cases involving highly vulnerable children, receive limited or no training on how to adapt professional approaches and procedures to accommodate the needs and rights of children.<sup>42</sup> Instead, most rely on their own instinct and experience or on (often relatively superficial) ad hoc training.<sup>43</sup> Widespread retraction of legal aid, brought about by the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, has also significantly reduced incentives for lawyers to undertake more specialised casework involving children, never mind enhance their training in child friendly justice. Adults and children alike who are forced to litigate in person, pursue alternative forms of dispute resolution, or settle for lower quality legal advice and representation may not even have access to a lawyer for an explanation of a particular ruling.<sup>44</sup>

Even if such issues were resolved to enhance the potential of lawyers and other justice professionals to communicate decisions to children, there is

41 *ibid*, 108 (Appendix A – Magistrates Association Protocol). Similar guidance to explain decisions in language that the child can understand accompanies proceedings that seek to use local authority accommodation to restrict a child's liberty under the Children Act 1989, s 25 – see in particular Part III of the Magistrates' Courts (Children and Young Persons) Rules 1992, para 22. On the obligations that apply to Crown Court proceedings, see Criminal Procedure Rules, Part 25 'Trial and Sentence in the Crown Court' (October 2015, as amended April 2016, April 2018 and October 2018), in particular Criminal Procedure Rule 25.16(7)(iii).

42 This is the case even in New Zealand where there is a system of specialist lawyers for children. See A. Parkes, 'Implementation of Article 12 in Family Law Proceedings in Ireland and New Zealand: Lessons Learned and Messages for Going Forward' in T. Gal and B.F. Duramy (eds), *International Perspectives and Empirical Findings on Child Participation* (Oxford: OUP, 2015).

43 EU Fundamental Rights Agency, *Child-friendly Justice – Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States* (Vienna: FRA, 2015).

44 M. Lagrue and K. Dorling, *Rights without Remedies: Legal Aid and Access to Justice For Children* (London: Coram Children's Legal Centre, 2018); S. Woodhouse and F. Meyler, 'Changing the immigration rules and withdrawing the 'currency' of legal aid: the impact of LASPO 2012 on migrants and their families' (2013) 35 JSWFL 55.

something unique and fundamental, beyond their skills and proximity to the client, about the positioning of judges as protagonists of justice, and about the potentially transformative effects of judges communicating decisions directly to children.<sup>45</sup> This speaks not only to judges' potential, but to their responsibility to address and perhaps even minimise children's social, legal and political marginalisation. Such a perspective acknowledges that children constitute a special group requiring differential treatment in terms of how decisions are conveyed to and understood by them. As we and others note elsewhere, children are uniquely vulnerable: their unequal position in the social, political, economic and legal world is such that they are, by default, dependent on others to meet their needs and to represent their interests, politically, legally, socially, economically and even culturally.<sup>46</sup> Children cannot vote for those who adopt the laws that affect them; they have limited means of independent redress when their rights and legal entitlement are breached; and even when such redress is available, their voices are commonly silenced or only represented by adult proxies. Affording children special attention in legal decision-making, therefore, helps to 'level' the playing field and reposition children centre-stage of decision-making. So why, in light of such arguments, do judges not simply change their approach?

## DECISIONS RELATING TO CHILDREN: JUDICIAL ATTITUDES

The judicial oath in the UK requires that a judge 'do right to all manner of people',<sup>47</sup> but few would insist that this obligation extends to conveying the outcome of their decision-making directly to the parties involved, least of all to children. Indeed, judges might well have strong objections to such a suggestion on a number of grounds. The first are ethical: some may regard it as inimical to the interests and wellbeing of a child to expose them to sensitive factual or evidential context of central importance to a decision, particularly where such exposure might irreparably damage a child's relationship with or perceptions of the other parties implicated in the decision (such as a parent in child protection or abduction proceedings).<sup>48</sup> It may be considered entirely appropriate in such

45 This is somewhat analogous to a child's experience of medical treatment: most would expect the details of any diagnosis, treatment and prognosis to be communicated to the child directly by the medical specialist directly responsible for diagnosing and treating the child (such as the consultant or surgeon). Others involved in the child's treatment, care and recovery play an important role in that process, but their input is complementary to, rather than instead of, that of the doctor.

46 A. Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011); A. Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' [2010] PL 767; and K. Hollingsworth and H. Stalford, 'Towards Judgments for Children' in Stalford, Hollingsworth and Gilmore, n 25 above, ch 3. This is not to suggest that adults are not also vulnerable (see for example, J. Herring, *Vulnerability, Childhood and the Law* (Cham: Springer, 2018)) but we nonetheless contend that unique vulnerabilities attach to the status of childhood.

47 Promissory Oaths Act 1868, s 4.

48 Consider, for instance, the sensitive nature of child protection cases involving parental substance misuse, which constitute a significant proportion of all public care cases across numerous jurisdictions. See J. Harwin et al, 'Child and Parent Outcomes in the London Family Drug and

cases for an intermediary perceived to have the necessary training, insight and relationship with the child to filter those aspects of the decision of most relevance and value, or to reveal decisive factual context incrementally as the child matures. Other decisions might justifiably be concealed from the child concerned either to protect his or her best interests or to protect the rights and wishes of other parties to the proceedings.<sup>49</sup>

A second objection to adapting judgments for children points to the complexities of some cases: many decisions, such as those relating to immigration and asylum claims, are underpinned by a dense evidential and legal canvas which may be regarded as too technical or nuanced to capture in judgments addressed directly to children. Reflecting on the inadequacies of judgments to convey the depth of the contextual insights in such cases, McCluskey notes:

It is this very feature of a judge's work that gives rise to the greatest public misunderstanding as to why a judge has imposed a particular sentence or decided a case in a certain way. Because, for the most part, and inevitably, the public are presented with only the sketchiest glimpse of the evidence ...<sup>50</sup>

A third, more practical objection to conveying judgments directly to children relates to the availability (or, rather, lack) of resources, particularly following over a decade of austerity measures. Crippling funding cuts to the justice system in the UK<sup>51</sup> have coincided with the implementation of an ambitious and initially costly reform programme, the intention of which has been to streamline the court system, reduce the number of courts and implement alternative mechanisms (including virtual courts and digital working) to render the courts more efficient.<sup>52</sup> Confronted with a system that promotes efficiency as much as it does fairness, accessibility and transparency, there is surprisingly little judicial appetite for seemingly superfluous and time-consuming innovations in the form of child-focused judgments.

A fourth objection is grounded in professional values, including an attachment to individual discretion. Judges are defined by their independence and individuality which extends to choosing 'both the form and language of their opinions'.<sup>53</sup> This brings with it differences in personal style and preferences, reflecting the individual voice of the judge and the audience he or she has in mind. Judges may therefore legitimately resist calls to do things differently if it is seen to undermine their freedom to decide for themselves the form and tone their judgment should take. Other judges may, conversely, feel that their

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Alcohol Court Five Years On: Building on International Evidence' (2018) 32 *International Journal of Law, Policy and the Family* 140.

49 As in *AB v CD & C* n 28 above, or in cases relating to the obligation to disclose hereditary conditions to children against the wishes of their parents, as in *ABC v St Georges NHS Trust* [2017] EWCA Civ 336.

50 J. H. McCluskey, *Law, Justice and Democracy* (London: Sweet and Maxwell, 1987) 6.

51 Research reveals that the Ministry of Justice has seen a 27 per cent reduction in funding, a much greater reduction than in other areas of public expenditure. See further M. Chalkley, 'Funding for Justice 2008 to 2018: Justice in the Age of Austerity' Bar Council of England & Wales, November 2018, 9.

52 Chalkley, *ibid.* 14.

53 Lord Rodger, n 12 above, 227.

loyalty to judicial values of neutrality and impartiality would be compromised by the more ‘involved’, emotive approach associated with an individualised, personally directed decision.<sup>54</sup>

Linked to this is the concern that any calls to adapt judgments for children may be seen as a serious threat to the legal integrity of judicial decisions, particularly if a judgment carries precedential potential. Linguistic and legal precision matters, as does providing detailed authority. After all, judges must justify their decisions not by reason of their authority, but by the authority of their reasons.<sup>55</sup> This raises questions as to whether a judge can alter the words and style of the judgment, perhaps in quite fundamental ways for a child audience, whilst still retaining the precise nomenclature and reasoning required for an ‘appeal-proof’ decision. Not only is the risk of legal distortion amplified through simplification, but the persuasive power of the judgment may be lost too.

All of these objections are compelling, but can be met with equally, if not more, persuasive justifications in favour of more tailored and direct judicial communication. For instance, the concerns around the potentially ‘dumbing down’ effects of directing judgments to children, and the consequent possibility of compromising their legal integrity and precedential value, require a modicum of perspective: most cases involving children are not ones being decided by the Supreme Court or Court of Appeal, or indeed by the High Court; rather, they are one of the hundreds of decisions issued by the family courts, immigration tribunals and magistrates each week. For these courts, although the judge must have one eye on an appeal, there is little *legal* reason why judgments should not be presented in ways suitable for children.<sup>56</sup> But other arguments do demand a deeper reflection as to what we regard as the function and value of judgments for children. We locate this within the broader canvas of constitutional principles (the rule of law and open justice) and relational values (helping to secure procedural and therapeutic justice) and argue that both of these perspectives – the constitutional and the relational – demand special consideration and treatment in children’s cases.

54 See S. Roach Anleu, S. Bergamn Blix and K. Mack, ‘Researching Emotion in Courts and the Judiciary: A Tale of Two Projects’ (2015) 7 *Emotion Review* 145, 145; S. Roach Anleu and K. Mack, ‘Magistrates’ Everyday Work and Emotional Labour’ (2005) 32 *J Law & Soc* 590, 611; and K. Mack and S. Roach Anleu, ‘Performing Impartiality: Judicial Demeanor and Legitimacy’ (2018) 35 *Law and Social Inquiry* 137. See further the discussion of the functions of judgments for children below.

55 McCluskey, n 50 above, 2–3.

56 Support can be found in the Court of Appeal’s recent decision in *R v Chin Charles*: ‘There has been a tendency in recent years, understandable but unnecessary, to craft sentencing remarks with the eye to the Court of Appeal rather than the primary audience [the offender] identified by Parliament’ [2019] EWCA Crim 1140, 7. On alternative approaches to judging in the lower courts see R. Hunter, S. Roach Anleu and K. Mack, ‘Judging in the Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches’ (2016) 12 *Int JLC* 337.

## THE FUNCTION OF JUDGMENTS

Much of the academic literature on judicial decision-making focuses on the way in which judgments are reasoned in substantive terms. But *how* a judgment is written – the tone, language, structure – is equally important. In recent years, this aspect of the court's role – what Rackley calls the 'art and craft' of judging<sup>57</sup> – has been subject to critique from judges and academics alike, with factors such as the length and structure of judgments,<sup>58</sup> the use and extent of legal authorities,<sup>59</sup> the complexity of language,<sup>60</sup> and the pros and cons of multiple versus single (composite) judgments coming under increased scrutiny.<sup>61</sup> A concern for clarity lies at the heart of this literature and reflects the growing recognition that a judge's audience is comprised of lay people (the wider general public as well as those directly affected by and involved in the proceedings) as much as legal or constitutional actors (including other courts, counsel, or parliament). As Lady Justice Arden notes, 'If I am right to define readership as including laypersons, it follows that, to achieve effective communication, judgments should aim for simplicity of expression'.<sup>62</sup> For ordinary citizens, a judgment's clarity is important because it has constitutional implications for the rule of law principles of accessibility and, relatedly, open justice.<sup>63</sup> Law must be capable of being read and understood not only by legal practitioners but by the 'community in general', that is, by people who are 'not lawyers at all'.<sup>64</sup> It enables citizens to acquire sufficient legal awareness to anticipate the legal consequences of their own and others' actions and to comply with the law.<sup>65</sup> The requirement for accessibility is thus founded on liberal ideas of fairness and autonomy. As Lord Neuberger argues:

If the law is to be properly accessible, then the courts are under the same duty of accessibility as is placed on the legislature – above all, in common law systems, where, albeit within bounds, the judiciary make and develop the law, as well as

<sup>57</sup> n 10 above.

<sup>58</sup> Arden, n 12 above.

<sup>59</sup> Lord Denning, *The Family Story: The Fascinating Life of One of the Great Judges of Modern Times* (Feltham: Butterworth, 1981) 206.

<sup>60</sup> Arden, n 12 above.

<sup>61</sup> See R. Hunter and E. Rackley, 'Judicial Leadership in the UK Supreme Court' (2018) 38 *Legal Studies* 191.

<sup>62</sup> Arden, n 12 above, 518.

<sup>63</sup> On the relationship between the form of legal judgments and the rule of law see: T. Bingham, *The Rule of Law* (London: Allan Lane, 2010) ch 3; M. Gleeson, 'Courts and the Rule of Law' *The Rule of Law Series*, Melbourne University, 7 November 2001; M. Duckworth, 'Clarity and the Rule of Law: The Role of Plain Judicial Language' in R. Sherd (ed), *A Matter of Judgment: Judicial Decision-making and Judgment Writing* (Sydney: Judicial Commission of New South Wales, 2003); Lord Neuberger, 'Open Justice Unbound?' *Judicial Studies Board Annual Lecture*, 2011; D. Fairgrieve, 'Simply a Matter of Style: Comparing Judicial Decisions' (2014) 25 *European Business Law Review* 361; and M. Adler and D. Perry, *Clarity for Lawyers: Effective Legal Language* (London: The Law Society, 2017).

<sup>64</sup> Arden, n 12 above, 517. See also Lord Neuberger, *ibid.* It is, suggests Lord Neuberger, the public who are the real audience of legal judgments (*ibid.*, para 10).

<sup>65</sup> This is particularly crucial in criminal law where ignorance of the law is no excuse. On accessibility, law and the ECHR see *Hashman & Harrup v UK* (2000) 30 EHRR 241 and *Sunday Times v UK* (1979-80) 2 EHRR 245.

interpret it . . . Indeed, the increasing complexity of the law imposes a greater obligation than ever on judges to make themselves clear.<sup>66</sup>

Clear, well-reasoned judgments also support open justice by providing the transparency necessary to demonstrate that justice has been done, thus facilitating scrutiny of judicial decision-making, improving accountability and, from the perspective of the individual judge, helping to make the judgment ‘appeal proof’. The enhanced transparency that comes from a clear judgment, written in plain language, also has implications for the parties to the proceedings: it enables a person to understand why and how the court came to its decision, and thus shapes their ability to make sense of and comply with any resulting obligations or, indeed, to identify potential grounds of appeal. An intelligible judgment can therefore be regarded as an important component of access to justice and procedural fairness, and an integral requirement of Article 6 ECHR.<sup>67</sup> The uniquely universal vulnerability of children as legal and political citizens<sup>68</sup> demands that this obligation not only extends to them, but extends to them with force,<sup>69</sup> and should shape our understanding of the functions of judgments involving children.

Beyond the rule of law, judgments perform a relational and recognitional function: they are a means by which judges, the personification of the legal system in the eyes of many litigants,<sup>70</sup> communicate formally, finally, and authoritatively with the parties and wider public. Kritzer frames this as an ethic of care, suggesting that judges should:

communicate decisions in a way that both those affected by the decision and those simply interested in it perceive as reflecting serious and deep consideration. That is, the judge needs to be able to convey a sense of caring and concern.<sup>71</sup>

<sup>66</sup> Lord Neuberger, n 63 above, para 7.

<sup>67</sup> See for example, *Seryavin and others v Ukraine* App no 4909/04 ECtHR, 10 February 2011, where the European Court of Human Rights (ECtHR) focused on the lack of clarity in the reasons provided by the court as the basis for a breach of Article 6 ECHR, highlighting in its judgment the importance of clear reasons to enable parties to know they have been heard; to provide an opportunity to be heard; and to increase public scrutiny of the administration of justice (at [58]).

<sup>68</sup> See again the references in n 46 above.

<sup>69</sup> *V v The United Kingdom; T v The United Kingdom* (1999) 30 EHRR 121. See further the discussion around n 86 below.

<sup>70</sup> A phrase used by Emily Buss in ‘The Developmental Stakes of Youth Participation in American Juvenile Court’ in T. Gal and B. Duramy (eds), *Promoting the Participation Right of Children Across the Globe: From Social Exclusion to Child-Inclusive Policies* (Oxford: OUP, 2015) 303, 316. The concept of a ‘judge’ is also understood by children before other legal concepts such as lawyer. See A. Warren-Leubecker, C.S. Tate, I.D. Hinton and I.N. Oxbek, ‘What Do Children Know about the Legal System and When Do They Know it? First Steps Down a Less Travelled Path in Child Witness Research’ in S.J. Ceci, M.P. Toglia and D.F. Ross (eds), *Perspectives on Children’s Testimony* (New York, NY: Springer-Verlag, 1989) 173.

<sup>71</sup> H.M. Kritzer, ‘Towards a Theorisation of Craft’ (2007) 16 *Social and Legal Studies* 321, 337. On emotionally intelligent communication in the context of criminal justice, see F. Jamieson, *Narratives of Crime and Punishment: A Study of Scottish Judicial Culture* unpublished Phd Thesis, University of Edinburgh, 2013 and C. Tata and F. Jamieson, ‘Just Emotions?’ (2017) 5 *Scottish Justice Matters* 32.



In doing so, judgments are a transactional process that convey messages, intended or not, which contribute to more individually-felt notions of justice in a procedural<sup>72</sup> and therapeutic sense.<sup>73</sup> Both of these approaches draw attention to the ways in which the processes as well as the substantive outcomes of judicial decisions can achieve something for those involved beyond the resolution of the immediate dispute in question.<sup>74</sup> Procedural justice, a concept developed primarily in the context of criminal justice proceedings, is concerned with *perceptions* of fairness and, in turn, legitimacy. Where processes are regarded as legitimate an individual is more likely to accept the decision, and comply with it, even where that decision has not gone in their favour.<sup>75</sup> It is also suggested that procedural justice contributes to a wider sense of trust in the law and legal proceedings, enhancing what Tyler refers to as the ‘legal socialisation’ that equips citizens with the tools and knowledge to understand the role and scope of the law, why and how it should regulate our behaviour and, crucially, when it should not.<sup>76</sup> Therapeutic justice builds on the insights of procedural justice and recognises the possibility that well-executed legal processes support emotional and psychological repair in the face of highly traumatic and emotionally-charged life experiences.<sup>77</sup>

Although the focus of both approaches is on the broader participatory processes, the judgment itself is the culmination and legacy of the proceedings. It is the official record of what happened and why and can support or undermine any sense of justice that might have been achieved earlier in the proceedings. In that sense, a judgment can convey much more than the outcome and reasoning of the decision; subtle yet powerful messages are revealed in the way the individual is spoken about (or to) within the judgment; the tone struck and the language used can confer dignity, respect and recognition of the parties’ status as rights-bearing citizens, including whether their views and perspectives (where they have participated) have been taken into account.<sup>78</sup>

72 On procedural justice, see for example, J.W. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NY, London: Lawrence Erlbaum Associates, 1975) and T. Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990).

73 See especially the work of David Wexler and Bruce Winick, including *Essays in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1991) and *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996).

74 On the complementarity between procedural and therapeutic justice see N. Stobbs, ‘Therapeutic Jurisprudence and Due Process – Consistent in Principle and in Practice’ (2017) 26 *Journal of Judicial Administration* 258.

75 A. McGrath, ‘Offenders’ Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatization in the New South Wales Children’s Courts’ (2009) 42 *Australian and New Zealand Journal of Criminology*, 24. For judicial recognition of the relationship between procedural justice and compliance with the law, see *Osborn v Parole Board* [2014] AC 1115 at [70] *per* Lord Reed.

76 See especially T. Tyler and R. Trinkner, *Why Children Follow Rules: Legal Socialization and the Development of Legitimacy* (Oxford: OUP, 2018).

77 Where judges can play a role as ‘translators’ (where they ‘reframe issues brought up by one party so that the other side better understand it’) and ‘facilitators’ (where courts allow other parties to better understand each other). See N. Des Rosiers, ‘From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes’ (2000) 13 *Canadian Journal of Law and Jurisprudence* 171.

78 For a recent example, see Lord Kerr’s (dissenting) judgment in *R (P. G. and W) v Secretary of State for the Home Department* [2019] UKSC 3 and his detailed articulation of the ‘iniquitous’

Procedural and therapeutic justice share commonalities with the constitutional values of the rule of law, and there is a particular complementarity between procedural fairness and procedural justice.<sup>79</sup> However, in thinking about the relational qualities of procedural and therapeutic justice, our attention is drawn more readily to the subjective, concrete experiences of the individual in the courtroom rather than the more formalist, abstracted requirements commonly associated with the rule of law. As Hollander-Blumoff and Tyler note, such an approach:

relies on individuals' judgments about their voice, the courtesy and respect with which they are treated, and the neutrality and trustworthiness of the decision-maker.<sup>80</sup>

If we accept, then, that judgments (as one aspect of the justice process) have an important relational function which shapes how an individual experiences justice in a broader sense, we can begin to see that one size and shape of judgment does not fit all, in much the same way that one procedural approach may not suit all; judgments aimed at the abstract (adult) legal agent may not be universally suitable. There is then a case to be made for differentially written judgments tailored to particular individuals or groups, including differentiating between children, depending on their age, capacities and experiences.

This requires something of a radical, more functional shift in judges' approach to crafting their judgments. We suggest that for cases involving children this might be assisted by understanding judgments as performing four functions in particular: the communicative (explaining decisions to children implicated in the decision in a way that they can understand); the instructive (conveying decisions in ways that can be understood by children as a subset of the wider public, to support children's legal literacy and engagement on a particular point of common relevance); the developmental (recognising the potential of legal processes and outcomes to positively influence children on a profound emotional, cognitive, social and psychological level); and the legally transformative (recognising how shifts in approaches to judgment writing stimulates and, indeed, necessitates deeper judicial engagement with children's rights-based norms, principles and methods throughout the process).

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impact on the respondents of the disclosure of historic, low-level offending in enhanced criminal records checks which was largely ignored in the leading judgment. On the relationship between openness, dignity, rights-recognition and Article 6, see P. Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Decisions in Criminal Trials' (2011) 11 HRL Rev 213. Also see Des Rosiers, *ibid*.

79 We differentiate them here on the basis that procedural fairness relates to minimum procedural standards that are capable of being *objectively* determined and evidenced (and thus more closely associated with rule of law/constitutional obligations), whereas procedural justice has at its heart a concern with the personal or subjectively felt experiences of the individuals involved. However, on the dovetailing of procedural justice with the formalist elements of the rule of law see R. Hollander-Blumoff and T. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 1 *Journal of Dispute Resolution* 1, 8. On the relationship between 'conventional' judging, procedural justice and therapeutic justice, see Hunter, Roach Anleu and Mack, n 56 above.

80 *ibid*, 9.

## THE FUNCTIONS OF JUDGMENTS FOR CHILDREN

In this section we examine these four inter-related and mutually supportive ways in which judgments for children help realise justice for children. We argue that having a clearer appreciation of these functions would enable judges to move beyond a superficial, sentimentalised notion of ‘child friendly judgments’ and to discharge their duties towards children in a more authentic and far-reaching way.

### The communicative function

Judgments written with a child audience in mind have a *communicative* function. They help children to understand and to accept the final decision of the proceedings, fulfilling for children a sense of procedural and therapeutic justice outlined above, as well as meeting constitutional requirements of access to justice and procedural fairness. It is this function of judgments for children that can most readily be grounded in rights-based obligations under the ECHR and the UNCRC.<sup>81</sup>

The obligation to conduct proceedings in a way that children can understand is an explicit recommendation of the UN Committee on the Rights of the Child,<sup>82</sup> and required by Article 6 ECHR (the right to a fair hearing).<sup>83</sup> As far as the latter is concerned, we suggest that clear communication is a logical extension (and bridging) of two implied Article 6 rights: the right to participate during proceedings<sup>84</sup> and the right to a clear, reasoned decision.<sup>85</sup> For children, this obligation takes on a sharper form when considered in light of the European Court of Human Rights’ dicta in *V v United Kingdom*. In this case, the Court stated that in justice proceedings children should be ‘dealt with in a manner which takes full account of [their] age, level of maturity and intellectual and emotional capacities and that steps are taken to promote [the child’s] ability to understand and participate in the proceedings.’<sup>86</sup> Importantly, the Court reasoned, their participation should be *effective*. Given that a court decision is one of a succession of stages and a critical component of the wider procedural canvas

81 Of course, we recognise that such assertions are based on a presumption that the judgment is inherently fair and, indeed, that the law on which the judgment is based is fair.

82 See in particular General Comment No 24 (2019) *Children’s Rights in the Child Justice System* (replacing General Comment No 10 (2007) *Children’s Rights in Juvenile Justice*) para 57; and General Comment No 12 (2009) *The Right of the Child to be Heard* para 28.

83 ECHR, Art 6(1): 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

84 *SC v United Kingdom* (2005) 40 EHRR 10.

85 *Taxquet v Belgium* (Grand Chamber) (2012) 54 EHRR 26; and *Seryavin and others v Ukraine* n 67 above, which required not only that reasons be given but that they be given clearly.

86 n 69 above at [84].

of the case rather than just the end point (particularly if delivered by the lower courts and subject to appeal), the rationale that underpins effective participation should extend also to the nature and delivery of the judgment itself.<sup>87</sup> This reasoning, combined with the right to a clearly reasoned decision, provides support for a stand-alone implied Article 6 right to 'effective communication of outcome', invoking the same obligation applicable to other participatory constructions of Article 6 that full account be taken of the child's age and level of maturity.<sup>88</sup>

This type of child-focussed judgment invites children to ascertain and absorb the factual and legal accuracy of a decision and to contribute in an informed way to decisions about how to implement it or whether to pursue an appeal. It also helps to minimise any confusion a child might experience about the implications of the decision and facilitates his/her compliance with any specific obligations arising from it. Moreover, in the domestic context, it ensures that the court, as a public authority under section 6(3)(b) of the Human Rights Act 1998, does not neglect its own Article 6 duties by delegating the function to another professional, thereby increasing the risk of losing the nuance, clarity and intended effect of the judgment.

In practice it is not uncommon for judges to employ language and phrases that are incomprehensible to most children. In an analysis of 30 recent parental child abduction cases, for example, we found some judges resorted to language, phrases, idioms and tone that did little to speak to children and added nothing to the judgment's clarity.<sup>89</sup> Even in criminal proceedings, notwithstanding heightened awareness of the Article 6 ECHR requirements, scant attention is paid to whether children understand the terminology used (such as 'acquitted', 'suspended sentence', 'culpability' or 'mitigation') to describe what will happen to them next.<sup>90</sup> Consider for example, the case of a 14 year-old boy with ADHD and a cognitive ability that placed him in the bottom five per cent of his

87 See also *SC v UK* n 84 above, where the ECtHR held '... "effective participation" in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, *including the significance of any penalty which may be imposed*', at [29] (emphasis added).

88 Despite the ECtHR's reluctance to 'articulate any sort of overarching view of how it approaches the recognition and interpretation of implied rights', Goss identifies the factors which the Court takes into account when doing so. A number of these factors support the development of this new implied right for children (including taking account of generally recognised international standards - which here would include the Council of Europe's *Child-friendly justice guidelines* - the object and purpose of Article 6 read as a whole, and the rule of law). R. Goss *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Oxford: Hart Publishing, 2014) 89-114.

89 For example, Mostyn LJ's use of idioms such as 'piling Ossa upon Pelion' and 'as plain as a pike staff' in *SP v EB* [2014] EWHC 3964. See further K. Hollingsworth and H. Stalford, 'Judging Parental Child Abduction: What does it Mean to Adopt a Children's Rights-based Approach?' in G. Douglas, M. Murch and V. Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Netherlands: Intersentia, 2018).

90 Particularly, but not exclusively, in the Crown Court. See A. Kirby, 'Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: a Question of 'Court Culture'? (2017) 12 *Crim LR* 949; K. Saywitz, C. Jaenicke and L. Camparo, 'Children's Knowledge of Legal Terminology' (1990) 14 *Law and Human Behaviour* 523; D. Watkins, E. Lai-Chong, J. Barwick and E. Kirk, 'Exploring Children's Understanding of law in their everyday lives' (2018) 38 *LS* 59.

age group and who was convicted of joint enterprise murder.<sup>91</sup> Few adaptations were made to his trial to accommodate his young age and vulnerability,<sup>92</sup> and his so-called ‘participation’ took place from a secure dock, where he sat alongside his co-defendants without any adult support. Although his capacity to understand the outcome of the proceedings was not considered as part of his (ultimately unsuccessful) appeal it is not hard to imagine the confusion he might have felt to be sentenced to ‘Detention During Her Majesty’s Pleasure’ (the legally correct but unenlightening terminology used for the child version of a life sentence) for a murder that took place when he was not, in fact, present.<sup>93</sup> For these children, placed in the secure dock for the duration of the trial, the only adult in their vicinity who can explain what has happened is the court security officer.<sup>94</sup> An obligation on the judge to communicate the outcome in ways the child understands would go some (albeit perhaps modest) way to meeting the object and purpose of Article 6 as a whole, and specifically the implied right that we argue for here.

However, the communicative function of judgments for children goes beyond meeting the requirements of procedural fairness. Through the messages it conveys, implicitly and explicitly, the judgment is pivotal in communicating directly to the child and contributing to his or her sense of procedural justice.<sup>95</sup> As Oldfather notes ‘[f]our of the key attributes affecting perceptions of process include participation, trustworthiness, respect, and neutrality. All of these involve, to varying degrees, assessments that can be affected by a judicial opinion’.<sup>96</sup> Thus, a judge can use the judgment to explain to the child the processes that have been followed in order to reach the decision, including the weight that has been accorded to the child’s wishes and feelings, the reasons that were most determinative and why and how these shaped the final outcome. Such transparency allows the child to see that the judge has not ‘taken sides’ and has acted impartially. The judge can also implicitly demonstrate to the child that she has been listened to by adopting within the judgment the language and expressions the child uses or through telling the ‘story’ (the facts) from the perspective of the child. This can convey empathy and understanding for the child’s experiences, show that the child’s rights have been considered and protected, and demonstrate to the child that she has been treated with dignity

91 *R v McGill* [2017] EWCA Crim 1228.

92 Contrary to the relevant Criminal Practice Direction at the time, [2015] EWCA Crim 1567, 3G Vulnerable Defendants.

93 See also the experiences of the 11-year-old child whose trial was successfully challenged as a breach of Article 6 ECHR in *SC v UK* n 84 above. The court noted (at [33]) that ‘even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father’.

94 See S. Lambe and K. Hollingsworth, ‘Protecting Vulnerable Child Defendants in England and Wales: A House of Cards?’ in G. Lansdell, B. Saunders and A. Eriksson (eds), *Neurodisability and the Criminal Justice System: Comparative and Therapeutic Responses* (Cheltenham: Edward Elgar, forthcoming).

95 According to Tyler, communication is one of the four factors of procedural justice. Tyler and Trinkner, n 76 above.

96 Oldfather, n 12 above, citing T. R. Tyler, ‘Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform’ (1997) 45 *American Journal of Comparative Law* 871, 882–883.

and respect as a rights-holder.<sup>97</sup> In these and other ways the judgment holds the potential to increase the legitimacy of the decision in the child's eyes by winning their trust and gaining their acceptance of the decision. In turn, this increases the likelihood that the child will comply with a decision not merely because she understands that she must, but because she *accepts* it as the right thing to do in the eyes of the law and on the evidence available.<sup>98</sup>

In the criminal law context, the success or otherwise of achieving these aims has implications not only for the child but for the wider community. Involvement in the criminal justice system is, in and of itself, a criminogenic factor; it increases the likelihood of future offending.<sup>99</sup> The reasons for this are complex but interactions with justice professionals, particularly the presence or otherwise of transparent and respectful communication, are a key influencing factor. This was recognised by Lady Hale in *R(R) v Durham Constabulary* who noted that the failure by the police

to tell the child and his stepfather the full consequences of the warning [a caution for children], including the sex offender registration requirement, obviously upset them both and left them with a considerable sense of injustice . . . any educational benefit to be gained from diversion [that is, reduced recidivism] is severely jeopardised if the offender feels unjustly treated'.<sup>100</sup>

Similarly, research with children undertaking community sentences has demonstrated that a participatory approach, where limited life chances are acknowledged and children feel understood, is more likely to foster desistance from future offending.<sup>101</sup> In criminal court proceedings, the judgment (the sentencing remarks), whether delivered orally or in writing, offers a similar communicative opportunity for the judge to adopt a relational and recognitional-based approach. By articulating the sentencing decision and the underpinning reasons in ways that show the child that her views and experiences have informed the outcome, and through respectful and caring language that foster feelings of inclusiveness, the potential for stigmatisation is mitigated and rehabilitation and reintegration more likely.<sup>102</sup>

97 J. Anderson and A. Honneth, 'Autonomy, Vulnerability, Recognition and Justice' in J. Christman and J. Anderson (eds), *Autonomy and Challenges to Liberalism* (Cambridge: Cambridge University Press, 2005).

98 See Oldfather, n 12 above, 1337–1338; Tyler and Trinkner n 76 above.

99 L. McAra and S. McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4 *European Journal of Criminology* 315; Tyler and Trinkner, *ibid.*

100 [2005] UKHL 51, 43. And see again, *Osborn v Parole Board* n 75 above.

101 See Manchester Centre for Youth Studies, Participatory Youth Practice principles at <https://www2.mmu.ac.uk/mcys/gmyjup/pypp/> (last accessed 26 March 2019). For a broader discussion of a relational approach to youth justice, particularly through judicial articulation of rights, see K. Hollingsworth, 'Children and Juvenile Justice Law: The Possibilities of a Relational Rights Approach' in J. Dwyer (ed), *Oxford Handbook on Children and the Law* (Oxford: OUP, 2020). Rangatahi courts in New Zealand are a good example of a relational, recognitional approach to court proceedings in youth justice. See K. Quince, 'Rangatahi Courts' in A. Deckert and R. Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (London: Springer, 2017) 711.

102 See McGrath, n 75 above; K. Daly and B. Bouhours, 'Judicial Censure and Moral Communication to Youth Sex Offenders' (2008) 25 *Justice Quarterly* 496.



Of course, that is not to overstate the benefits associated with the communicative function of judgments for children. For example, the argument that such judgments written on the child's level support better compliance with or acceptance of a decision is less compelling where the outcomes of such a decision are unequivocally bleak or profoundly unfair. In immigration and asylum, for instance, the main objective of a decision refusing leave to remain is to close off access to entitlement, opportunities and security in the UK, and such decisions are entirely in keeping with an explicitly hostile immigration legal framework. No amount of sugar coating will make such a bitter pill easier to swallow. Children too may be sceptical of perceived tokenistic or inauthentic attempts to reflect their experience in a judgment,<sup>103</sup> especially if there has been an absence of genuine participation prior to that point.<sup>104</sup> And so, if we are to justify child-specific adaptation of judgments, we need to look beyond the communicative function.

### The developmental function

Exposure to rights-affirming legal procedures as a child can have a long-term impact, helping not only to facilitate acceptance of and reconciliation with the specific decision in question but also to contribute to the child's longer-term overall development, sense of identity and legal citizenship. Legal decisions commonly mark a critical milestone in a child's personal history. Having often already invested in the process leading up to the decision – through direct testimony, independent representation or submissions to the court through intermediaries – children have an obvious and significant practical and emotional stake in its outcome. Legal decisions can dramatically change the course of their life and become an integral part of their life story. A child at the centre of a child arrangements dispute, for instance, will potentially have to make the biggest practical and emotional adjustments to their everyday routines and plans to accommodate the prescribed residential and contact arrangements imposed on their parents.

The legal proceedings provide the platform where such conflicts are aired and where children's private lives are subject to intense personal scrutiny. Their encounters with the law and with the professionals with whom they interact thus become a memorable, potentially formative, experience. Interactions with key legal actors, and the judge in particular, can have a profound impact upon the child's development and wellbeing.

Notwithstanding the pressures associated with legal proceedings, the imperative to conduct them positively is underpinned by what Emily Buss calls the 'child-rearing' function of the law. This implies an obligation to develop *our* children's potential – 'our' indicating the state's and its representatives' obligation – not only through the substantive outcomes of legal decisions that affect

103 Thank you to Anne Marie Douglas, Founder and CEO of Peer Power for this reflection.

104 H. Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258.

them<sup>105</sup> but throughout the legal journey. This recognises also that childhood is a period during which the foundations for future flourishing are laid and when the effort, energy and support provided are more likely to have an enduring effect.

As a key judicial tool, judgments can serve a developmental function in a number of ways. First, they can help the child acquire a broader understanding of the law and legal processes, and to discern the difference between legitimate and illegitimate laws, systems, and actions in ways that can shape their future engagement as legal citizens. These direct experiences are more central to children's 'legal socialisation'<sup>106</sup> and more influential than second-hand knowledge gained from friends, family, neighbours and the media.<sup>107</sup> This, in turn, cultivates a sense of inclusion, autonomy and, in some contexts (such as criminal justice) responsibility; central features of children's understanding of citizenship.<sup>108</sup> There is also the potential to develop the child's relational 'attitudes to self' – self-trust, self-worth and self-esteem – which support autonomous choices in line with a person's authentically-held values.<sup>109</sup> It can send a powerful message, at least to the child deemed to be capacitous, that she is trusted to make decisions, or to express and hold her own views *even if* they are not determinative in the particular case being decided.<sup>110</sup>

Peter Jackson's Letter to Sam exemplifies the power of adapted judgments to convey respect and empathy for the child; it offered a considered and sensitive explanation of how his views had been taken into account but did not shy away from explaining why, in this case, the judge had to make an assessment of Sam's best interests that was contrary to the boy's expressed wishes. In another similar case, Sheriff Anwar's letter to 'Julie and Brian' explains in humane, simple terms the various facts and legal issues that led to her decision concerning three children, aged between 6 and 12, at the centre of a bitter custody dispute between their parents. In particular, she emphasises that 'I have

105 See E. Buss, 'What the Law Should (and Should Not) Learn from Child Development' (2009) 38 *Hofstra Law Review* 13, and the similar approach applied in K. Hollingsworth, 'Theorising Children's Rights in Youth Justice' (2013) 76 *MLR* 1046. Also see examples in Stalford, Hollingsworth and Gilmore. n 25 above, including the rewritten decision by A. Daly of *R (Castle) v Commissioner for the Police for the Metropolis* [2011] EWHC 2317 (Admin) (supporting children's development as political actors).

106 A term used in J. Fagan and T.R. Tyler, 'Legal Socialization of Children and Adolescents' (2005) 18 *Social Justice Research* 217; Buss, n 70 above, 303.

107 Tyler and Trinkner, n 76 above.

108 R. Lister, 'Why Citizenship: Where, When and How Children?' (2007) 8 *Theoretical Inquiries in Law* 693; E. Such and R. Walker, 'Young Citizen or Policy Objects? Children in the 'Rights and Responsibilities' Debate' (2005) 34 *Journal of Social Policy* 39. See also UNCRC, Art 40 and the UN Committee on the Rights of the Child, General Comment No 24, para 15: 'If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others'.

109 C. Mackenzie, 'Three Dimensions of Autonomy: A Relational Analysis' in A. Veltman and M. Piper (eds), *Autonomy, Oppression and Gender* (Oxford: OUP, 2014).

110 See further Stalford, Hollingsworth and Gilmore n 25 above, 83–84.

especially thought about how you feel' and goes on to explain why she is ordering contact with their father in spite of the children's objections.<sup>111</sup>

Significantly more common, however, are judgments showing a blatant disregard for the child's personal identity or development.<sup>112</sup> For example, *Re P-S (Children) (Care Proceedings: Right to give evidence)*<sup>113</sup> involved a 15-year old boy who wanted to return to live with his mother rather than remain in foster care. The boy was granted separate legal representation as he did not feel his guardian was representing satisfactorily his true wishes and feelings. Not one aspect of the 49 paragraphs of the final Court of Appeal decision was directed to the boy, despite the fact that it was his request to give evidence via video-link that formed the basis of the appeal. Other judgments through language and tone go further in undermining the child's autonomy. Take, for example, the judge's dismissive and disparaging attitude towards the 13-year-old child in *Z v Y* involving a cross-border child abduction by the mother.<sup>114</sup> The judge responds to the child's objections – one of the legal exceptions to being automatically returned – by describing her as 'inappropriately empowered' and 'dredging up flimsy rationalisations'.<sup>115</sup> It is not hard to imagine the potentially negative impact of this on the girl's self-esteem, or how such a judgment might make her feel about the law and the justice process in general.

### The instructive function

A third function of judgments for children is their instructive value. As noted above, an important aspect of the rule of law is that the law is clear and accessible so that citizens can make choices fully informed of the legal consequences. Yet despite increased recognition of children's legal agency and their status as rights-holders, including in the development and articulation of children's rights within the common law, there have been no notable attempts to make these (or other) judgments accessible to children themselves, nor to consider the implications of this failure for the rule of law. Our concern here is not (only) with children involved in the specific proceedings, but with children as a group of citizens more widely to whom the rule of law and precedent applies.

Consider, for instance, the enormous instructive potential of the landmark children's rights decision in *Gillick v West Norfolk & Wisbech Area Health Authority*<sup>116</sup> (*Gillick*). The House of Lords' decision was monumental in shaping children's right to access to medical advice and treatment on their own behalf, and has had huge implications for children's autonomy rights in other realms of the law, notably in the context of family justice. Yet the complexity of the reasoning and the concepts and language used are likely to mean nothing to most

111 *Mr Patrick (a pseudonym) v Mrs Patrick (a pseudonym)* n 7 above. One might question, however, why the judge in this case did not attempt to adapt her letter to the third (youngest) child in the family.

112 Many such examples are featured in *Rewriting Children's Rights Judgments* n 25 above.

113 [2013] EWCA Civ 223, [2013] 1 WLR 3831.

114 [2013] EWHC 3381 (Fam) at [35] *per* Parker LJ.

115 *ibid* at [48] and [61] respectively.

116 [1986] AC 112.

children. Lord Scarman's seminal judgment in *Gillick* offers a sobering illustration of how fundamental tenets of child law are underpinned by staggeringly nebulous assertions of principle:

There is much that has to be understood by a girl under the age of sixteen if she is to have the legal capacity to consent to such treatment. It is not enough that she should have understood the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved . . .<sup>117</sup>

What would a child seeking to obtain contraceptive advice or other medical treatment without his or her parent's knowledge make of this? The statement does nothing to unpack 'sufficient maturity' or 'understanding' nor to explain how they are to be tested and defined; we are merely told that it is for the doctor to determine whether the child meets the prescribed threshold. A child would have little idea what characteristics they would need to exhibit to satisfy doctors that they are sufficiently mature to obtain that treatment without parental interference. Moreover, how would even the most capable child make sense of what Simon Lee calls the 'beguiling' use by the House of Lords in *Gillick* of the term 'public policy',<sup>118</sup> a concept routinely advanced across a huge spectrum of private and public law cases to limit children's legal claims? Other pivotal legal concepts such as 'best interests', 'capacity',<sup>119</sup> 'competence' or 'consent', or even terms that are conceptually straight-forward for the justice professional such as 'custody', 'bail', 'wardship' or 'remand',<sup>120</sup> are utterly alien to children.

We argue, therefore, that (especially) in key decisions on children's rights such as *Gillick* the obligation for transparency and clarity goes beyond the child at the centre of the proceedings; it is about ensuring, as far as possible, that judgments are comprehensible to children as a wider community of legal citizens affected by the decision. This must include a commitment to developing a 'children's jurisprudence', particularly where the outcome of a decision has long term ramifications for their rights.<sup>121</sup>

117 *ibid*, 189.

118 S. Lee, *Judging Judges* (London: Faber and Faber, 1988) 84.

119 See further A. Daly, 'Understanding Children's Competence: Children's Rights and the Importance of Context' *International Journal of Children's Rights* (forthcoming 2021) on the vicissitudes of determining 'competence' in the context of decision-making.

120 See Watkins et al, n 90 above and research they cite including K. Saywitz, 'Children's Conceptions of the Legal System: "Court Is a Place to Play Basketball"' in S.J. Ceci, M.P. Toglia and D.F. Ross (eds), *Perspectives on Children's Testimony* (New York, NY: Springer-Verlag, 1989).

121 For an illustration of how a judge might summarise for children a landmark decision of this nature, see the fictive judgment by L. Lundy in App No 21787/93 *Valsamis v Greece* ECtHR, 18 December 1996 and *Government of the Republic of South Africa and Others v Grootboom*, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) by A. Pillay, in Stalford, Hollingsworth and Gilmore, n 25 above, 329 and 311 respectively.

## The legally transformative function

There are challenges in translating complex legal decisions into a language, structure and style that children can understand whilst remaining true to the law and legal principles underpinning them. Doing so, however, opens up the possibility of realising a fourth function: a judgment that is legally transformed. By this we mean a judgment that, substantively and procedurally, better aligns with children's rights principles and values. In making this argument, we suggest that judgments for children can go even further than the communicative, developmental and instructive functions outlined above. We treat form and substance as two sides of the same coin; the very process of crafting a judgment in a way that children can understand shines a light on the judge's approach to reasoning and adjudication.<sup>122</sup> It encourages the judge to position the child (or children) at the centre of his or her deliberations, potentially stimulating a greater engagement with his or her rights, interests and perspectives from the outset of the case.<sup>123</sup> In many cases, this is a matter of considering and articulating how the child-related provisions of the relevant domestic law in question have been brought to bear on their reasoning. Equally it forces the judge to explain how, specifically, the child's rights and interests have been assessed in light of the rights of other parties involved in the case. For example, Peter Jackson's Letter to Sam presents such considerations in a systematic, balanced way by reference to the various elements of the welfare checklist contained in section 1(3) of The Children Act 1989 and the views of his father:

Sam, the evidence shows that you are doing well in life at the moment. You have your school, your friends, your music, and two homes. You've lived in England all your life. All your friends and most of your family are here. I have to consider the effect of any change in the arrangements and any harm that might come from it. In any case where parents don't agree about a move overseas, the parent wanting to move has at least to show that they have a realistic plan . . . Your dad thinks he would find a good life and good work there, but I have seen nothing to back that up – he hasn't made a single enquiry about houses, schools or jobs. You don't speak the language and you haven't been there since before you were 5.<sup>124</sup>

Other cases may require judges to reflect on and explain how laws and rights that are primarily designed with adults in mind (such as the right to a fair trial or the right to respect for private and family life) can and should be applied to the child

122 On the effect of style on content see R.A. Posner, 'Judges' Writing Styles (and do they matter?) (1995) 6 *University of Chicago Law Review* 1421. See also Oldfather, n 12 above, 1285: '... the process of writing involves a fundamentally deeper sort of engagement with one's subject matter than is possible through mere reflection or discussion, which in turn leads to better comprehension and more rigorous thought'. He notes also the frequency with which 'the result the judge initially thought appropriate turns out, upon an attempt to justify the result in an opinion, to be unacceptable'.

123 See also Lord Denning, n 59 above, on the linkage he draws between looking at the merits of the decision and justice, and how the story is told. See also Stalford, Hollingsworth and Gilmore, n 25 above, 78.

124 n 1 above at [7].

implicated in the case. In doing so, judges might be more inclined to draw some interpretative inspiration from the provisions and principles expressed in the UNCRC and its accompanying guidance, or on the many other international legal instruments and texts that support different facets of children's rights. The Court of Appeal, for instance, may have reached a different conclusion on the fairness of the trial of the 14 year old described above, if it had confronted head on his limited capacities and composed sentencing remarks that he could comprehend, in light of Article 7 of the UN Convention on the Rights of Persons with Disabilities, or the Beijing Rules.<sup>125</sup>

A judgment for children also demands closer attention to whether the child has meaningfully participated in the proceedings and whether the case accurately reflects the child's rights and interests. Doing so builds rapport, increases the recognitional function of the judgment ('you have been seen and heard'), and shows the child that the judge has made an authentic attempt to understand and give 'due weight' to their wishes and feelings in accordance with Article 12 UNCRC. This confronts the often tokenistic and partial deference to hearing children or the nebulous summary of how children's best interests have been considered. This is particularly important for children subject to family proceedings in England and Wales who commonly feel invisible to the court insofar as they are rarely present and rarely give evidence directly. Indeed, their wishes and feelings tend to be represented by proxy, adult-filtered accounts, gleaned from relatively brief encounters with the child or through the parents.<sup>126</sup> It is for this reason, perhaps, that the Letter to Sam resonated so strongly with the legal community and public alike.

## JUDGMENTS FOR CHILDREN IN EVERYDAY PRACTICE

Our focus in this article has been on making the case for judgments for children and to articulate conceptually the four functions they serve. But this inevitably prompts a consideration of what judgments for children would look like in practice. In particular, it raises questions as to whether it is realistic and desirable to develop tailored judgments in *all* proceedings involving *all* children, especially those who are very young, who have communication difficulties, or who are unaware that the proceedings are taking place. We contend that, even in these types of case, judges should strive to write a judgment for the child. Not all

125 UN Standard Minimum Rules for the Administration of Juvenile Justice, 1985, GC Res 40/33 of 29 November 1985. See in particular Rules 5 and 7 which emphasise respectively the well-being of the juvenile, the need to act proportionality in light of the young person's personal circumstances, and the need to ensure procedural safeguards are in place.

126 For a detailed analysis of the case law and empirical evidence in this regard, see A. Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Nijhoff: Brill, 2018); K. Tisdall and F. Morrison, 'Children's Participation in Court Proceedings when Parents Divorce or Separate: Legal Constructions and Lived Experiences' (2012) 14 *Law and Childhood Studies: Current Legal Issues* 156; L.J. Thorpe, 'The Voice of the Child in Family Proceedings' (2010) *International Family Law* 136; R. Hunter, 'Close Encounters of a Judicial Kind: "Hearing" Children's "Voices" in Family Law Proceedings' (2007) 19 *CFLQ* 283; Transparency Project News, 'How are Children's Voices Heard in the Family Justice System?' (2017) Dec *Family Law* 1396.



of the four functions will be achievable with equal measure or in the same way in every case but even in proceedings involving an infant (for example), a judgment written for the child to read at some point in the future has the potential to influence how the judge determines the case (legally transformation function); and if the judgment is accessible to the child later in her childhood as part of her life story, it has the potential to shape and develop her identity and self-understanding (developmental function). Furthermore, a wide variety of formats are open to judges that can be tailored to meet the needs and capabilities of the particular child. For example, the judgment could take the form of a letter to a child (as in Peter Jackson's judgment); it might consist of a 'plain English judgment' that explains complex legal and factual issues in much simpler terms;<sup>127</sup> it could be a judgment within a judgment;<sup>128</sup> an appended, accessible summary;<sup>129</sup> or even an explanatory note on the child's file. Even more innovatively, diagrams, cartoons or video-recorded messages could be especially useful for younger children or those with communication difficulties.<sup>130</sup>

We resist the temptation to prescribe further what a judgment for children should look like; that will of course depend on the nature of the proceedings, the complexity of the case, and the individual characteristics of the child. But two points can be made here. First, our understanding of how the four functions can be achieved in practice must be informed by further empirical work drawing on the views of children who have direct experience of proceedings in different legal contexts.<sup>131</sup> This experiential insight can inform judicial training and help judges to avoid common pitfalls by, for example, identifying language and tone that might be perceived by children as condescending or alienating. Second, in all cases, judges should be guided by at least four principles when drafting judgments for children, all of which speak to the four functions described above. The first is the principle of clarity. Judgments should be clear; they should use appropriate language, avoid obtuse phrases, idioms and legalese, and technical terms should be explained to facilitate children's access to and understanding of them. Judgments should also be caring: judges should employ empathy and give explicit recognition to the child's experiences in both content and tone and they should be conscious of ensuring that the child feels 'seen', for example by using a pseudonym rather than an initial. Third, judgments for children should not compromise the legal integrity of the decision; a delicate balance needs to be drawn between simplifying language and engaging directly with the child, on the one hand, and communicating legally robust interpretations of the law, on the other, that can stand up to further (judicial)

127 See example in n 7 above and see again the rewritten judgment in *Government of the Republic of South Africa and Others v Grootboom* n 121 above, 311.

128 See the example in n 7 above.

129 See the rewritten judgment in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) by J. Bridgeman, in Stalford, Hollingsworth and Gilmore, n 25 above, 96.

130 We are aware of such innovations already being used by some judges in the English courts.

131 For example, we have undertaken a small pilot project that explores with children their experiences of sentencing and their views of a sample 'sentence for a child'. For more details see <https://www.ncl.ac.uk/media/wwwnclacuk/newcastleuniversitylawschool/files/JANUARY%202020%20Research%20briefing%20sentencing.pdf> (last accessed 20 April 2020).

scrutiny. Finally, a judgment for children should be informed – it should seek to spell out the child's relevant rights, and be supported by evidence and by the child's own views and experiences.

## CONCLUDING REMARKS: TOWARDS JUDGMENTS FOR CHILDREN

This paper has sought to stimulate some discussion as to why judges communicate their decisions to children in the way that they do. In doing so, it has presented arguments in favour of a radical reframing of the functions and value of judgments for children. Our intention has been to make a compelling case as to why judgments should be adapted for children rather than to prescribe what a judgment for children should look like. This has prompted broader reflections on the role of judgments, on the specific needs of children in legal proceedings, and on the unique power and potential of judges to address children's routine social, political and legal marginalisation. There are, of course, some examples of judges making their decisions more accessible to the children affected by them, but such examples are relatively rare and very much the product of individual judges' impulse and insight. For the most part, in spite of some progress towards adapting legal processes to meet the needs of children, judges are very far indeed from routinely changing the format, content and tone of their final decisions to ensure that they can be understood by them.

Judgments for children need to be more than a superficial exercise in rebranding though; they need to go much deeper than merely presenting a decision in simpler language or in a shorter, more appealing format. They have to truly reflect and respond to the potential of judgments to better engage children as rights-bearing legal citizens; they have to embody authentic, informed, caring and rights-respecting attempts to speak to children as legal citizens. We suggest that this obligation extends even to those cases in which children are indirectly represented, and in which decisions are delivered orally rather than in writing.

Importantly, judgments for children can have benefits that extend beyond the children to which they relate. Notably, they can convey important messages to the adults charged with their care, particularly in disputes over contact, residence or aspects of the child's upbringing. This is evident in the concluding paragraph of Peter Jackson's Letter to Sam, for instance, which subtly cautions to the parents that they need to be more focused on Sam: 'Whatever each of your parents might think about [the order], I hope they have the dignity not to impose their views on you ...'<sup>132</sup>

Judgments written for children are also more likely to be accessible to a wider public audience, and in that sense perform a public interest function. The wider public are, whether they like it or not, invested in judicial decision-making. Even in cases involving children, it is not just the child who bears the consequences of any particular decision; it is the child's family, their communities, society at large, and it is the public who pay the financial costs (through taxes for prisons, public services such as social services, rehabilitation and

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132 n 1 above at [11].

compensation). As such, clear and considered explanations of decisions can not only prompt deeper judicial engagement with and accountability for children's rights but can transform the values and practices associated with the right to a fair trial and open justice more generally. A judgment for children, as articulated here, arguably captures the hallmarks of a *good* judgment more generally. Moreover, whilst our analysis has focused on legal proceedings in England and Wales, its recommendations could be applied to and, indeed, learn from a range of other jurisdictions guided by this same commitment, including those with a civil law tradition and even to the international courts. But whilst we might see the appeal of extending this typology to all manner of judgments, for adults as much as children, the case made here for specific judicial investment in tailoring judgments for children responds to children's uniquely and universally disenfranchised position within the legal process. It is also proffered as a means of achieving a more comprehensive commitment to justice for children in spaces and contexts that really matter to them.